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1 **UNITED STATES DISTRICT COURT**
2 **EASTERN DISTRICT OF WASHINGTON**

3 CITY OF SPOKANE, a municipal
4 corporation located in the County of
5 Spokane, State of Washington,

6 Plaintiff,

7 v.

8 MONSANTO COMPANY, SOLUTIA
9 INC., and PHARMACIA
10 CORPORATION, and DOES 1 through
11 100.

12 Defendants.

13 Case No.: 2:15-cv-00201-SMJ

14 **PLAINTIFF'S REPLY TO**
15 **DEFENDANTS' RESPONSE TO**
16 **PLAINTIFF'S MOTION FOR**
17 **SUMMARY JUDGMENT**

18 Hearing: March 11, 2020
19 Richland, WA
20 With Oral Argument

1 The City of Spokane moved for summary judgment on Monsanto's affirmative
2 defenses. ECF No. 410. Monsanto does not oppose the City's Motion as to two of those
3 defenses. ECF No. 526. And as to the City's motion regarding a limitations defense,
4 Monsanto's position is contrary to a ruling in a Western District of Washington case that
5 has facts almost identical to the instant matter. *Id.*

6

7 **1. Monsanto does not contest Spokane's motion regarding the comparative
8 fault of third parties.**

9

10 In its Motion (ECF No. 410), the City asked this Court to rule, as a matter of law,
11 that Monsanto is not entitled to a jury verdict that apportions fault to third parties in
12 accordance with RCW 4.22.070 because that statute specifically exempts actions arising
13 from hazardous substances. Monsanto does not disagree, but maintains that it is entitled
14 to a jury question regarding the City's own fault. ECF 526 at 15. The City agrees. As
15 Monsanto does not oppose summary judgment on the issue of third-parties' comparative
16 negligence, the Court should enter summary judgment in the City's favor on this issue.

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18 **2. Monsanto does not oppose Spokane's motion regarding the government
19 contractor defense.**

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21 Monsanto has withdrawn its federal contractor defense as moot.

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23 **3. Monsanto cannot avoid precedent holding that a Washington city is immune
24 to Monsanto's limitations defense in an action to remove PCBs from
stormwater and waterways.**

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26 The Western District of Washington ruled against Monsanto on this very issue in the
27 substantively identical lawsuit initiated by the City of Seattle. In *City of Seattle v.*

1 *Monsanto Company*, Judge Lasnik considered Seattle's allegations that Monsanto's PCBs
2 "contaminate[] Seattle's drainage systems and waterways," 237 F.Supp.3d 1096, 1101
3 (W.D.Wa. 2017), claims that are essentially identical to Spokane's allegations that
4 Monsanto's PCBs wash through its stormwater and wastewater systems and into the
5 Spokane River, thus contaminating Spokane's waterways and the State's natural resources.
6
7 See ECF No. 1 (Complaint) at 4-8, 11-18. Judge Lasnik found that Seattle's lawsuit against
8 Monsanto was an exercise of sovereign capacity:

9
10 In this action to restore the purity of its waterways, Seattle acts in its
11 sovereign capacity. Seattle is authorized by statute to prevent "the
12 defilement or pollution of all streams running through or into its
13 corporate limits," as well as to "declare what shall be a nuisance, and to
14 abate the same." RCW 35.22.280(29), -(30). This authority derives from
15 the state's duty to hold all navigable waters within the state in trust for
16 the public. See *City of New Whatcom v. Fairhaven Land Co.*, 24 Wash.
17 493, 499, 503–04 (1901) (describing the common-law origins of the
18 public trust doctrine). Accordingly, while these powers could be seen as
19 authority to administer the internal affairs of the incorporated territory
20 "for the special benefit and advantage of the urban community" within,
21 *City of Moses Lake*, 430 F. Supp. 2d at 1171–72, the Court concludes
22 that Seattle's efforts to rid its waterways of pollution is an act "for the
23 common good," *Wash. State Major League Baseball Stadium Pub.*
24 *Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Const. Co.*, 165 Wn.2d
25 679, 687 (2009). Like the maintenance of public recreational facilities,
26 maintenance of public waterways fulfills the city's delegated
27 responsibility to act as steward of the land and waters within its
28 boundaries for the benefit of the public at large, without regard to
 whether the beneficiaries are city residents. In suing to restore its waters,
 Seattle acts "for the public good, and not for private corporate
 advantage," *Russell v. City of Tacoma*, 8 Wash. 156, 159 (1894).

26 *Id.* at 1105. Monsanto dismisses this opinion as wrongly decided and tries to distinguish
27 the facts of Spokane's claims from those of Seattle's. ECF No. 526 at 11-12. But its
28

1 analysis fails for a number of reasons.

2 In ruling that Seattle enjoyed sovereign capacity, and therefore immunity, Judge
3 Lasnik considered the contrary cases now cited by Monsanto, including those previously
4 holding, for example, that operating a city drainage system was not a sovereign function.
5 *Id.* at 1104. The court correctly determined that these did not require a formulaic
6 conclusion that where a drainage system is involved, the action must be proprietary. While
7 “furnishing sewer facilities” has been held to be a proprietary action, *City of Algona v. City*
8 *of Pacific*, 667 P.2d 1124, 1126, 35 Wash.App. 517, 520 (Wash.App., 1983), Judge Lasnik
9 properly focused on the nature of Seattle’s actions in litigating against Monsanto, not in
10 merely operating its stormwater system. The court concluded that Seattle was not merely
11 operating its drainage system but taking an action to remove PCB pollution from its system
12 and thereby reduce the pollution of the State’s waterways and improve water quality
13 generally. *Id.* This analysis applies with full force here. Spokane has undertaken the
14 instant case to reduce the levels of PCBs that its stormwater and wastewater systems
15 discharge into the Spokane River. ECF No. 1 (Complaint) at paragraphs 5-18, 22-24; *see*
16 also ECF No. 519 (Plaintiff Statement of Disputed Material Facts) at 2-5.

17 The reduction of pollution is an exercise of power traceable to the sovereign
18 powers of the State as described by *Washington Public Power Supply System v. General*
19 *Elec. Co.*, 778 P.2d 1047, 1049, 113 Wn.2d 288, 293 (1989). The State Legislature
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1 specifically granted to cities of the first class¹ the powers to “provide for”:

2 **the cleaning and purification of watercourses and canals . . . and to**
3 **prevent and punish, the defilement or pollution of all streams running**
4 **through or into its corporate limits, and for the distance of five miles**
5 **beyond its corporate limits, and on any stream or lake from which the**
6 **water supply of said city is taken, for a distance of five miles beyond its**
7 **source of supply; to provide for the cleaning of areas, vaults, and other**
8 **places within its corporate limits which may be so kept as to become**
9 **offensive to the senses or dangerous to health**

10 RCW 35.22.280 (29) (emphasis added). In its attempt to remove insidious PCB pollution
11 and prevent further contamination of waterways, Spokane is doing far more than merely
12 operating a municipal stormwater system as has been found to be a proprietary activity.²

13 See *City of Moses Lake v. U.S.*, 430 F.Supp.2d 1164, 1176–77 (E.D.Wa. 2006).

14 The Washington Supreme Court has explained that a municipality performs both
15 proprietary and sovereign actions and distinguished the latter --- where a municipality acts
16 “as an agent of the state . . . and to promote the public welfare generally,” from those actions
17 that “administer the local and internal affairs of the territory which is incorporated, for the

20 ¹ First class cities are those, like Spokane, with a population over 10,000. RCW 35.01.010.

21 ² Monsanto cites no authority for the proposition that Spokane’s compliance with certain
22 regulations means that it cannot, as a matter of law, be acting in its sovereign capacity. Nor
23 would such a rule be logical. Both the City and the State are bound by any number of
24 regulations that constrain certain day-to-day functions, but that restriction on certain
25 activities does not change the character of its larger governmental purpose.

1 special benefit and advantage of the urban community embracing within the corporation
2 boundaries.” *Washington State Major League Baseball Stadium Public Facilities Dist. v.*
3 *Huber, Hunt & Nichols-Kiewit Const. Co.*, 202 P.3d 924, 927, 165 Wn.2d 679, 687 (2009)
4 (internal citation omitted). This distinction supports Spokane’s argument because its
5 actions relating to preventing PCB discharges and ameliorating levels of PCB
6 contamination in public waterways are sovereign acts delegated to Spokane by RCW
7 35.22.280 (29). Moreover, Spokane’s efforts further the policy of the State of Washington
8 to “maintain the highest possible standards to insure the purity of all waters of the state[.]”
9 RCW 90.48.010. In this context, although the stormwater system is the conduit for
10 Spokane’s action, the City should be immune from limitations.
11

12 Further, Spokane has demonstrated that its past and anticipated future efforts will,
13 in fact, help to restore the water quality of the Spokane River. By reducing the amount of
14 PCBs it discharges, Plaintiff will reduce the risk of disease associated with eating fish from
15 the Spokane River. ECF No. 382-1 at 514, 516-520. Plaintiff’s remedial efforts will also
16 reduce the ecological risk posed by PCBs in the River and, more specifically, reduce
17 sediment concentrations of PCBs in Lake Spokane to levels below hazard thresholds. ECF
18 No. 519 at 98-99 (response to 195).
19

20 Finally, Monsanto argues, oddly, that Spokane’s argument that RCW 4.16.160
21 immunizes it from limitations, is, itself, untimely. Relying on Pennsylvania cases,
22 Monsanto claims that Spokane has somehow waived this defense by not raising the
23

1 doctrine of *nullum tempus* immunity during the pleadings stage. ECF No. 526 at 17 and
2 18. Monsanto fails to cite a Washington case for this proposition and mischaracterizes
3 Pennsylvania law. The case cited by Defendants involved a plaintiff invoking the *nullum*
4 *tempus* argument for the first time during appeal. *See Twp. of Indiana v. Acquisitions &*
5 *Mergers, Inc.*, 770 A.2d 364, 370 (Pa. Commw. Ct. 2001). A later Pennsylvania case
6 rejected the same argument made by Monsanto here and held that *Indiana* does not require
7 a plaintiff to allege *nullum tempus* at the pleading stage. *See Allegheny Intermediate Unit*
8 *v. E. Allegheny Sch. Dist.*, 203 A.3d 371, 380 (Pa. Commw. Ct.), *appeal denied*, 216 A.3d
9 1032 (Pa. 2019) (explaining that plaintiff employed *nullum tempus* argument “at the
10 appropriate stage” of litigation when invoked in pre-trial statement and in its motion for
11 partial summary judgment). Because Monsanto’s position is not supported by law or logic,
12 the Court should disregard this desperate attempt to defeat the State’s immunity.³

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20³ Regardless, even at the pleadings stage, Plaintiff alleged that its actions to reduce PCB
21 discharge are sovereign in nature: “The City of Spokane is a municipality acting for the
22 benefit of the state and the general public in the City of Spokane and others throughout the
23 State of Washington. The City of Spokane has a duty and inherent responsibility to manage
24 its waste and stromwater systems to maintain the clean waterways of the State of
25 Washington.” *See* ECF No. 1 at paragraph 16.

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CONCLUSION

Spokane respectfully requests the Court to enter partial summary judgment against Defendants as requested in its motion (ECF No. 410).

RESPECTFULLY SUBMITTED this 3rd day of March 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which in turn automatically generated a Notice of Electronic Filing (NEF) to all parties in the case who are registered users of the CM/ECF system. The NEF for the foregoing specifically identifies recipients of electronic notice.

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